Liu, J.

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

In the Matter of GARY DOUGLASS GRANT, State Bar No. 173665, A Member of the State Bar.	CASE NO. S 197503 [St. Bar Case No. 09-C-12232]

RESPONDENT GARY DOUGLASS GRANT'S ANSWER TO THE STATE BAR OF CALIFORNIA'S PETITION FOR WRIT OF REVIEW OF DECISION OF STATE BAR COURT

Law Offices of Michael G. York
Michael G. York, SBN 89945
1301 Dove Street
Suite 1000
Newport Beach, CA 92660
Telephone: (949) 833-8848
Facsimile: (949) 955-3682
Email: york@dslextreme.com

Attorneys for Respondent
GARY DOUGLASS GRANT

TABLE OF CONTENTS

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

In the Matter of GARY DOUGLASS GRANT, State Bar No. 173665, A Member of the State Bar.	CASE NO. S 197503 [St. Bar Case No. 09-C-12232]

I. PRELIMINARY STATEMENT

The Petition for Review ("Petition") raises two issues, whether a conviction for violation of Penal Code section 311.11(a) involves moral turpitude *per se* and, assuming that such a conviction does not inherently and in all cases involve moral turpitude, whether the Review Department's recommended discipline of two years actual suspension with additional terms and conditions is appropriate in light of Respondent Gary Douglass Grant's conduct. As the following discussion will show, the evidence presented regarding the facts and circumstances surrounding Mr. Grant's conduct is proof alone that a conviction for violation of section 311.11(a) does not inherently and in all cases involve moral turpitude. In addition, the Review Department's recommended discipline is appropriate.

As the following discussion also shows, the case put on by the Office of Chief Trial Counsel is problematic for a number of reasons. Amongst other

things, at trial evidence was introduced in violation of the rules of evidence, Mr. Grant was deprived of a fair hearing and due process, and the State Bar did not prove Mr. Grant was culpable by clear and convincing evidence.

As the following discussion additionally will show, the Petition mischaracterizes the facts, the evidence, and the record, and it fails to disclose material facts. The Petition's most egregious mischaracterization is of the admission that was a part of Respondent's guilty plea. Thus, while it should be unnecessary to include a Statement of Facts and Events in an Answer, the following Statement of Facts and Events is included to correct the Petition's mischaracterizations and to set forth material facts that the Petition fails to disclose.

II. STATEMENT OF FACTS AND EVENTS

A. Mr. Grant's Guilty Plea.

In 2008, Mr. Grant was charged with three counts of violating Penal Code Section 311.11(a) ("Section 311.11(a)"). Mr. Grant pleaded not guilty. (State Bar's Pretrial Statement dated June 21, 2010, p. 2.)

Mr. Grant was, and for several years had been, addicted to adult pornography. Over the years, Mr. Grant had viewed a tremendous amount of adult pornography on the internet, downloaded a tremendous amount of adult pornography to his computers, and exchanged adult pornography with others via email. From just downloading and exchanging adult pornography, Mr.

Grant had about 300,000 images of adult pornography on his computers. (Rev. Dept. Opn., p. 6; RT: Vol. II: 85:5-86:15, 188:10-189:7; RT: Vol. IV: 39:7-45:1.)

Mr. Grant contended that during the time he viewed adult pornography he received two e-mails that were unsolicited, and which *after* he opened he discovered that they included images which he believed depicted minors. Upon realizing this, Mr. Grant immediately deleted the e-mails and the images attached to the e-mails. However, because of the way computer systems work, the images remained permanently on his computer. (Rev. Dept. Opn., pp. 6-7, 10-11; RT: Vol. II: 60:18-67:7, 186:21-187:15, 188:10-192:5; RT: Vol. IV: 34:5-36:9, 40:10-45:1, 92:16-93:15.)

In January, 2009, the Third Appellate District decided *Tecklenburg v. Appellate Div. of Superior Court* (2009) 169 Cal.App.4th 1402 ("*Tecklenburg*"). In *Tecklenburg*, the defendant had been convicted of six counts of knowing possession or control of child pornography in violation of Section 311.11(a). One of the questions raised in the case was whether a defendant could be convicted of possessing child pornography stored in a computer's cache files absent some evidence that he was aware those files existed. This question arose because the defendant sought to argue that he did not know that the images were in his cache files (the volume of which resulted in an increased sentence), although the evidence was overwhelming that the defendant had knowingly visited internet websites portraying child

pornography. The court concluded that if an image of child pornography is displayed on a computer screen, its display *is* knowing possession or control that violates Section 311.11(a). (*Id.* at p. 1419.) The court further stated that knowledge from actively downloading and saving child pornography to a computer, printing it or emailing it, or knowledge or manipulation of TIF's or cache files, "is *not* an essential predicate for knowing possession and control of computer generated images of child pornography" under Section 311.11(a). (*Id.* at p. 1419, fn. 16 (emphasis added).)

Shortly after *Tecklenburg* was decided, in February, 2009, Mr. Grant's criminal defense attorney, Charles Spagnola, advised him that in *Tecklenburg* the court held that the display of an image *alone* violates Section 311.11(a), in essence making it a strict liability crime.[1] (RT: Vol. II: 64:14-67:7, 186:21-187:1; RT: Vol. IV: 21:22-25:18, 92:16-93:15; Respondent's Exh. II.)

In April, 2009, Mr. Grant pleaded guilty to a single count of a violation of Section 311.11(a). The other two counts were dismissed. (State Bar's Pretrial Statement dated June 21, 2010, p. 2.) This evidence was the *only* evidence presented as to Mr. Grant's plea.

The Petition mischaracterizes Mr. Grant's admission that was a part of his guilty plea. Mr. Grant admitted the elements of Section 311.11(a); that is,

---

[1] It is possible court where the criminal matter was pending or other courts would not have interpreted *Tecklenburg* the same as Mr. Grant's criminal defense attorney did. Today, a Westlaw search reflects no less than 20 citing references to *Tecklenburg*. However, in February 2009, there were *no* citing references and, therefore, there was no guidance as to how courts would subsequently interpret the case.

that *the minors in the images were* "exhibiting their genitals for the purpose of sexual stimulation of the *viewer*." (Section 311.11(a) [emphasis added]; St. Bar, Exh. 4, p. 3.) In other words, the admission tracked the language of 311.4(d) that the *minors'* purposes in exhibiting their genitals was for sexual stimulation of the viewer. However, contrary to statements made numerous times in the Petition, Mr. Grant did *not* admit that *he* possessed any prohibited images for *his* sexual stimulation. (St. Bar, Exh. 4, p. 3.)

Furthermore, there was no admission as to the number of images Mr. Grant possessed, nor in the criminal proceeding was any finding made as to the number of images Mr. Grant possessed. (St. Bar Exh. 4, p. 3.)

B. Pre-Trial Events.

At all times since 2007, all of the images on Mr. Grant's computers, including the images at issue in this proceeding, were in the possession of the Orange County District Attorney's office. Prior to trial, the District Attorney's office agreed to submit the images to the State Bar Court for trial subject to a protective order, the language of which the State Bar and the District Attorney's office were in the process of agreeing upon. (State Bar's Pretrial Statement dated June 21, 2010, pp. 5-6.)

As the trial approached, the State Bar subsequently decided, on its own, that it would not have the District Attorney's office submit the images for trial. (State Bar's Supplemental Pretrial Statement dated June 22, 2010, pp. 1-2.)

The State Bar also decided, on its own, to not subpoena the images to be produced at trial, and it did not do so. (RT: Vol. I: 108:11-109:8.) As summed up by the Review Department in its Opinion, the State Bar "made *no* effort to use the court's process, such as issuing a subpoena duces tecum, petitioning the appropriate state or federal court or other means to obtain the images for trial." (Rev. Dept. Opn., pp. 8-9 [emphasis added].)

Even though the District Attorney's office was willing to submit the images to the State Bar Court for trial subject to a protective order, according to the State Bar's trial counsel, the State Bar decided that it would not have the District Attorney's office submit the images for trial and that it would not subpoena the images to be produced at trial, because *it* decided that by having the images in its presence at trial that somehow *it* would then have possession of the images, which would violate the laws against possession of child pornography. (State Bar's Supplemental Pretrial Statement dated June 22, 2010, pp. 1, 4.) The State Bar did not explain, and in its Petition still does not explain, why, if the District Attorney's Office submitted the images to if the District Attorney's Office submitted the images to the State Bar Court for trial; if the State Bar subpoenaed the images to be produced at trial and in response to the subpoena the District Attorney's Office submitted the images to the State Bar Court for trial; or if the computer forensic examiner from the District Attorney's office who the State Bar had testify at trial regarding the images (discussed below), brought the images with her to trial; that the State Bar

would then somehow be in unlawful possession of the images.

The State Bar's apparent difficulties with having the images in its presence did not deter the State Bar, and only the State Bar, from viewing the images. More specifically, prior to trial, the State Bar's trial counsel went to the District Attorney's office and viewed the images. (RT: Vol. I: 125:5-127:2.) Importantly, the State Bar did not give notice to Mr. Grant or his attorney that its trial counsel was going to the District Attorney's Office to view the images, to give Mr. Grant and his attorney an opportunity to view the images that the District Attorney's Office had or to view the same images that the State Bar's trial counsel viewed. (RT: Vols. I-IV, *passim* [no claim or record by State Bar that notice provided to Mr. Grant or his attorney].)

More importantly, the State Bar *fails to disclose* in its Petition that its trial counsel went to the District Attorney's office and viewed the images. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881 [appellants are "required to set forth in their brief *all* the material evidence on the point and *not merely their own evidence*"] (emphasis in original).)

C. The Computer Forensic Examiner's Examination and Trial Testimony.

At trial the State Bar attempted to prove that Mr. Grant possessed images of child pornography in addition to the two images attached to the two unsolicited e-mails that he admitted receiving and which he immediately

deleted. The images which the State Bar sought to prove Mr. Grant possessed, however, were not produced at trial. Instead, the State Bar had the computer forensic examiner from the District's Office who had examined the computers containing the images, Amy Wong, testify regarding the images on Mr. Grant's computers. (RT: Vol. I: 77:17-81:2, 83:16-85:19, 90:17-92:4, 123:10-124:25.)

The State Bar had Wong testify regarding the number of images and the ages of the persons depicted in the images. With respect to the *number* of images at issue, the Petition mischaracterizes the number of images by contending that there were "numerous other images" found on Mr. Grant's computer. (See e.g., pp. 5-6, 17.) The forensic examiner testified that there were only **19 images** in which the persons depicted looked like they were or appeared to be under 18 years. (Rev. Dept. Opn., p. 5.) The Petition fails to point out that these 19 images represented less than 0.00019% of the images on Mr. Grant's computers.

With respect to Wong's testimony concerning the *ages* of the persons depicted in the images, she readily admitted that *determining a person's age was not part of her job* and that *she was not an expert in determining persons' ages*. (Rev. Dept. Opn., p. 6; RT: Vol. II: 60:18-67:7, 186:21-187:15, 188:10-192:5; RT: Vol. I: 116:23-24, 119:14-18.) Consequently, in her report on her examination of Mr. Grant's computers, Wong only broadly described the images as being ones that "*may* be of interest to" the Department of Homeland

Security, Immigration and Custom Enforcement ("ICE"), and/or that persons in images were "*possibly* minors." (Rev. Dept. Opn., pp. 5-6; RT: Vol. II: 60:18-67:7, 186:21-187:15, 188:10-192:5; RT: Vol I: 114:12-115:10 [emphasis added].) For this reason, Wong's task was largely limited to bookmarking images for subsequent review by ICE. As she noted, it was ICE's job to determine the ages of the persons depicted in the images, not her's. (Rev. Dept. Opn., pp. 5-6; RT: Vol. II: 60:18-67:7, 186:21-187:15, 188:10-192:5; RT: Vol I: 115:24-116:25.)

Notably, the State Bar did *not* have an expert from ICE, or any other expert, testify as to their opinion of the ages of the persons depicted in the images. Instead, the State Bar had Wong testify as to her *lay* opinion of the ages of the persons depicted in the images. (Rev. Dept. Opn., pp. 5-6; RT: Vol. I: 81:3-83:11, 86:23-89:7, 90:17-92:4, 118:18-119:16, 123:10-124:25.) Even then, Wong merely testified that the persons depicted in the images "looked like" they were or "appeared" to be under 18. (Rev. Dept. Opn., p. 6; RT: Vol. I: 115:5-116:25.)

Based on the fact that the State Bar did not introduce the subject images into evidence, the hearing judge (that is, the trier of fact) did *not* view the images, the most critical evidence at trial. Moreover, Mr. Grant's attorney had *never* seen the images; thus, he was unable to view the images at trial to assist him in cross-examining Wong (the State Bar's sole witness) or otherwise properly represent Mr. Grant.

Another major flaw in the Petition, again, is one of omission. It fails to note that there was *no* evidence that Mr. Grant downloaded any images from any website dedicated to or known for child pornography, *no* evidence that he posted any images onto a public bulletin board, *no* evidence that he shared any images using peer-to-peer programs, and *no* evidence that he "chatted, either instant messaging or e-mailing or otherwise communicated, with minors." (Rev. Dept. Opn., pp. 10-11; RT: Vol. I: 99:25-100:3, 117:1-15, 117:17:20, 122:20-123:3.)

D. Testimony By Mr. Grant's Therapist.

The Petition glosses over the fact that Mr. Grant presented several witnesses including, but not limited to, James Hughes, a therapist with whom Respondent had treated for more than two years, and three separate reports prepared by Hughes. (Respondent's Exhs. Q, R, and S.) Hughes is a licensed and board certified therapist, including being a sex therapist; and he has extensive education and experience, including experience with sex offenders and persons interested in child pornography. (RT: Vol. II: 103:7-106:9.) As Hughes' testimony and the three reports showed, Mr. Grant is not a pedophile, has no interest in children, sexual or otherwise, and poses no danger to children or the general public. (RT: Vol. II: 113:6-16.) Hughes further testified that Mr. Grant showed no interest in viewing or collecting child pornography, and that any such contact with it was inadvertent and a result of

Mr. Grant's prior viewing of adult internet pornography. As Hughes diagnosed, Mr. Grant has been undergoing treatment for his issues and has made substantial progress. (Rev. Dept. Opn., p. 7; RT: Vol. II:112:7-122:7; Respondent's Exhs. Q, R and S.)

The Petition argues that Hughes' opinion is weakened by Mr. Grant's admission. (See p. 20 fn. 9.) As set forth above, however, the Petition mischaracterizes the content and the nature of Mr. Grant's admission as part of his guilty plea. The truth is that Hughes' testimony and the admission are not inconsistent. Moreover, the State Bar neither rebutted nor impeached Hughes' testimony.

III. ARGUMENT

A. Introduction.

The Petition raises two issues: first, whether a conviction for violation of Penal Code section 311.11(a) involves moral turpitude *per se* and, second, assuming that such a conviction does not inherently and in all cases involve moral turpitude, whether the Review Department's recommended discipline of two years actual suspension is appropriate in light of Mr. Grant's conduct.

A violation of section 311.11(a) does not involve moral turpitude per se. Crimes of moral turpitude (not involving dishonesty) indicate a "general readiness to do evil," such as murder or *serious* sexual offenses. A crime involves moral turpitude per se only if in every case it entails moral

turpitude. A conviction of section 311.11(a) does *not* in every case involve moral turpitude. As this case shows, any unlawful images in Mr. Grant's possession were received unsolicited (or were so close to the age of majority reasonable minds could differ as to whether they were under age 18).

The sentence imposed by the Review Department is appropriate in light of Mr. Grant's conduct. More specifically, Mr. Grant received two images unsolicited and immediately deleted them. Mr. Grant did not actively search for child pornography, did not visit such websites, and did not chat online concerning child pornography. In short, his conduct did not entail moral turpitude.

The Petition, presumably in an effort to distract from those several and substantial problems, mischaracterizes the facts, the evidence and the record. The most egregious example is the mischaracterization of Mr. Grant's admission that was a part of his guilty plea. As discussed above, Grant admitted that the minor's purposes in exhibiting their genitals was for sexual stimulation of the viewer. Mr. Grant never admitted that he possessed images for his sexual stimulation

Based on the characterization that Mr. Grant admitted that he possessed images for his sexual stimulation, the Petition makes numerous statements, all of which are false because they are all based on the mischaracterization of Mr. Grant's admission that was a part of his guilty plea, e.g., Mr. Grant admitted that he possessed images for the express purpose of sexual stimulation, used

images for his sexual arousal and gratification, and was ready to exploit images of child pornography for his own disturbed purposes (pp. 1, 2 fn. 1, 16, 20 and 26); his testimony that he does not find child pornography sexually stimulating and that he finds such images repugnant, is misleading because it contradicts his admission (pp. 2 fn. 1, 11-12); that he testified falsely and the fact that he enjoys child pornography weakens the credibility of his claims (pp. 17, 20); and even that he uses images for his sexually stimulation (p. 17).

The Petition also states that the testimony of Mr. Grant's therapist is contradicted by Mr. Grant's admission. (Pp. 17, 20 fn. 9.) But that statement is also false because it also based on the mischaracterization of Mr. Grant's admission.

B. <u>This Case Is Not An Appropriate Case for Supreme Court Review</u>.

This case is not an appropriate case for Supreme Court review. The Petition argues that whether a violation of Section 311.11(a) is a crime that involves moral turpitude is a matter of first impression and sufficiently novel that it requires Supreme Court review. As with almost the entirety of the Petition, this is an overreach.

Characterization of a violation of section 311.11(a) by the State Bar Court is *not* novel. For more than a decade, the Review Department has consistently ruled that whether a violation of Section 311.11(a) is a crime that

involves moral turpitude depends on the facts and circumstances.[2] The Review Department has similarly ruled that whether the federal analog to Section 311.11(a) -- 18 United States Code section 2252A(a)(2) -- is a crime that involves moral turpitude depends on the facts and circumstances.[3] Thus, the State Bar Court does *not* need guidance in its handling of member matters involving a conviction for violation of Section 311.11(a).

The Petition further argues this case should be accepted for review on the ground that there is a need for consistency because the State Bar Court's disciplinary recommendations "vary greatly." (Pp. 3, 12.) In support of that argument the Petition cites several cases. (P. 3 fn. 2.) In none of those cases, however, did the State Bar Court make disciplinary recommendations, much

---

[2] See *In the Matter of Robert C. Fishman* (SBN 110630, Case No. 09-C-10197), Rev. Dept. Order dated December 29, 2009, holding that violation of Penal Code § 311.11(a) is "a crime which may or may not involve moral turpitude"; and see *In the Matter of Walter R. Luostari* (SBN 94326, Case No. 09-C-12413), Rev. Dept. Order dated June 10, 2010, holding that violation of Penal Code § 311.11(a) is a crime "that may or may not involve moral turpitude."

[3] The Review Department recognizes that Section 2252A(a)(2) is a **divisible statute** that defines two separate offenses; *i.e.*, receipt *or* distribution of child pornography. With respect to the former (receipt), the Review Department has held that it may or may not involve moral turpitude. See e.g., *In the Matter of Thomas Henry Merdzinski* (SBN 152148; Case No. 08-C-13180) Rev. Dept. Order, dated October 1, 2008, holding that violation of 18 U.S.C. 2252(A)(a)(5)(b) is a crime "which may or may not involve moral turpitude"; and Rev. Dept. Order, dated October 8, 2010, *denying* Motion for Summary Disbarment, ruling that "violation of Title 18, U.S.C., section 2252(A)(a)(5)(B) (possession of child pornography) 'is *not* a crime which inherently involves moral turpitude." With respect to the latter (distribution), the Review Department has held that a conviction for *distribution* of child pornography inherently involves moral turpitude. (See *In the Matter of Eric Michael Borgerson* (SBN 177943, Case No. 08-C-12600), Recommendation for Summary Disbarment, dated April 20, 2011.) See *In the Matter of Robert C. Fishman* (SBN 110630, Case No. 09-C-10197), Rev. Dept. Order dated December 29, 2009, holding that violation of Penal Code § 311.11(a) is "a crime which may or may not involve moral turpitude"; and see *In the Matter of Walter R. Luostari* (SBN 94326, Case No. 09-C-12413), Rev. Dept. Order dated June 10, 2010, holding that violation of Penal Code § 311.11(a) is a crime "that may or may not involve moral turpitude."

less disciplinary recommendations that varied greatly.[4] In truth and in fact, the State Bar Court has been handling such cases for years, with no apparent lack of consistency.

The case also is not an appropriate case for Supreme Court review because of the evidentiary and procedural problems with the trial. As set forth in detail in the Statement of Facts and Events (further discussed below), evidence was introduced in violation of the rules of evidence, Mr. Grant was denied a fair hearing and deprived of due process, and the State Bar did not prove Mr. Grant was culpable by clear and convincing evidence.

Last, the case should not be reviewed because of the Petition's blatant mischaracterizations. Simply put, the facts, the evidence and the record are not what the Petition represents them to be.

C. Evidence Was Introduced in Violation of the Rules of Evidence.

At trial evidence was introduced in violation of the rules of evidence, specifically the secondary evidence rule. (Rev. Dept. Opn., pp. 6-8.)

Under the secondary evidence rule (previously known as and still commonly referred to as the best evidence rule), the content of a writing must be proved by the admission of the original or, under certain circumstances,

---

[4] In all of the cases cited by the State Bar in footnote 2 involving possession, the members stipulated to disbarment. In the last case cited, the member was summarily disbarred for *distribution*.

admissible secondary evidence such as a duplicate. (Evid. Code, §§ 1520-1521.) Writings include images. (Evid. Code, § 250.) Oral testimony regarding the content of a writing generally is not admissible to prove the content of a writing. (Evid. Code, § 1523.) This prohibition exists because "oral testimony as to the content of a writing is typically less reliable than proof of the content of a writing." (Law Revision Comment to Evidence Code section 1523(a).)

There are three exceptions to the rule that oral testimony regarding the content of a writing generally is not admissible to prove the content of a writing. (Evid. Code, § 1523.) One exception is where "The writing is not closely related to the controlling issues and it would be inexpedient to require its production." (Evid. Code, § 1523(c)(2).) That exception is clearly inapplicable here. The content of the images was closely related to the controlling issues; indeed, it was *the* critical issue.

Another exception is where "the proponent does not have possession or control of a copy of the writing *and* the original is lost or destroyed . . ." (Evid. Code, § 1523(b) [emphasis added].) This exception also is inapplicable. The images at issue were not lost or destroyed but rather at all times were in the possession of the District Attorney's office.

The final exception under which oral testimony regarding the content of a writing is admissible to prove the content of a writing is where "the proponent does not have possession or control of a copy of the writing and

. . . (1) Neither the writing nor a copy of the writing was reasonably procurable by the proponent by the use of the court's process or other available means." (Evid. Code, § 1523(c)(2).) The "court's process" of course includes a subpoena duces tecum for the production of writings at trial. (Code of Civ. Proc., § 1985; Rules of Proc. of State Bar, former rule 152(e).) This exception is *not* applicable here because, as the Review Department noted, the State Bar did *not* subpoena the images or use any other court process or any other available means to procure the images. (Rev. Dept. Opn., pp. 8-9.)

The Petition attempts to argue that the final exception to the secondary evidence rule applies because the images were not procurable. (P. 23.) This argument is without merit for several reasons. The assertion that the images were not procurable is belied by the State Bar's own Pretrial Statement. In its Statement, it represented to the court that it was working on the language of a protective order, which they intended to submit along with the images. (State Bar's Pretrial Statement dated June 21, 2010, pp. 5-6.)

The Petition's argument concerning an exception to the secondary evidence rule also is without merit because trial counsel's actions bely any concern about violating Section 311.11(a). More specifically, trial counsel went to the District Attorney's office and viewed the images. If the images could not be shared with the State Bar's trial counsel at trial, then how could they be shared with the State Bar's trial counsel at the District Attorney's Office?

In summary, testimony regarding the content of the images is not admissible to prove the content of the images unless the images were not procurable by the use of the court's process or other available means. Because the State Bar made no effort to procure the images by the use of the court's process or other available means, the State Bar did not establish the exception to the secondary evidence rule to permit testimony to be admitted regarding the content of the images. (Rev. Dept. Opn., p. 9.)

For all of the foregoing reasons, the admission of the testimony regarding the content of the images and the age of the persons depicted in the images was in violation of the rules of evidence. The admission of the testimony also deprived Mr. Grant of a fair hearing and due process; specifically, the right to confront and conduct a meaningful cross-examination of the evidence against him.

D. The State Bar Did Not Prove That Mr. Grant Was Culpable By Clear and Convincing Evidence.

In a disciplinary proceeding, the State Bar must prove culpability and aggravating factors by clear and convincing evidence. (Std. 1.2(b); *In re Morse* (1995) 11 Cal.4th 184, 206.) In the present case, as discussed below, the State Bar did *not* prove misconduct by clear and convincing evidence, either as to the ages of the persons depicted in the images or as to the facts and circumstances surrounding Mr. Grant's conduct.

1. The State Bar did not prove by clear and convincing evidence the ages of the persons in the images.

The State Bar contends that Mr. Grant possessed 19 images which purportedly depicted persons under age 18. This contention was not proved by clear and convincing evidence.

Where a view of a person is reduced to a visual depiction and the person is unavailable for questioning, "the opportunity for reasonable mistake as to age increases significantly." (*United States v. X-Citement Video, Inc.* (1994) 513 U.S. 64, 72.) Given the chance of mistake, it has been held that where it must be proven that a person, "who is post-puberty but appears quite young, is less than eighteen years old, expert testimony may well be necessary." (*United States v. Katz* (5th Cir. 1999) 178 F.3d 368, 373.)

X-Citement Video and *Katz* elicit two interrelated questions: are the persons depicted in the images prepubescent or post-puberty, and what are the qualifications of the persons testifying as to the ages of the persons depicted? With respect to the former question, the Petition asserts that the persons depicted were "young children," thus attempting to argue that Wong's lay testimony was adequate. However, Wong did *not* testify that any person depicted was prepubescent, but rather to the contrary. In her report on her examination of Mr. Grant's computers, she stated that persons depicted in the images were "*possibly* minors." (Rev. Dept. Opn., pp. 5-6; RT: Vol. II: 60:18-

67:7, 186:21-187:15, 188:10-192:5; RT: Vol I: 114:12-115:10 [emphasis added].) The phrase "possibly minors" does not speak to whether a person is prepubescent or post-puberty; it does, however, suggest uncertainty. Subsequently at trial, Wong merely testified that the persons depicted in the images "looked like" they were or "*appeared*" to be under 18. (Rev. Dept. Opn., p. 6; RT: Vol. I: 115:5-116:25.) Even when she looked at her notes and guesstimated the age of the persons depicted, the youngest "apparent" age was of a person possibly between 14 and 16. (RT: Vol. I: 88:14-19.) In short, each of the 19 images in Mr. Grant's possession depicted someone *post-puberty*.

With respect to the latter question, it is unequivocal that the State Bar did *not* put on expert testimony. As more fully discussed above, the State Bar's sole witness readily admitted that determining a person's age was not part of her job and she was not an expert in determining persons' ages. (Rev. Dept. Opn., p. 6; RT: Vol. II: 60:18-67:7, 186:21-187:15, 188:10-192:5; RT: Vol. I: 116:23-24, 119:14-18.)

The questions posed by *X-Citement Video* and *Katz* and the evidence put on by the State Bar led the Review Department to conclude "reasonable minds could differ on whether the subjects in the images were actually under 18 years old." (Rev. Dept. Opn., p. 9.) Because reasonable minds could differ on the ages of the persons in the images, the State Bar did not prove by clear and convincing evidence that the persons in the images were under 18. (Rev. Dept. Opn., p. 10 and fn. 10.)

In summary, the Petition asserts that Wong's testimony as to her *estimate* of the persons' ages and their *approximate* ages (pp. 8 , 24 and 25) is sufficient to find Mr. Grant culpable of moral turpitude. The Petition's assertion only serves to prove the point. When the only evidence regarding persons' ages is testimony as to estimated or approximate ages, the evidence does not prove their ages by clear and convincing evidence.

2. The State Bar did not prove by clear and convincing evidence that Mr. Grant's *conduct* involved moral turpitude.

The Petition argues that there is no doubt as the nature of Mr. Grant's conduct and that it invariably involves moral turpitude. However, the record at trial is one entirely different from that which the Petition attempts to portray. As the record shows, there was *no* evidence that Mr. Grant downloaded any images from a website dedicated to or known for child pornography, *no* evidence that Mr. Grant posted any images onto a public bulletin board, *no* evidence that Mr. Grant shared any images using peer-to-peer programs, and *no* evidence that Mr. Grant "chatted, either instant messaging or e-mailing or otherwise communicated, with minors." (RT: Vol. I, pp. 99:25-100:3, 117:1-15, 117:17:20, 122:20-123:3.)

The *sole* evidence of any conduct relating to the possession or control of images proscribed by Penal Code section 311.4(d) is that Mr. Grant

testified he received two images (each of which was attached to and e-mail that had multiple images attached) which he believed depicted a person under 18 and which he immediately deleted, and that he obsessively viewed *adult* internet pornography, during the course of which he may have come into possession of a small number of images (*i.e.*, less than 0.00019% of the total images in his possession or control) which may have been of a person "actually under 18 years old." (Cf. Rev. Dept. Opn., p. 10.)

In summary, the evidence does *not* support the conclusion that Mr. Grant was interested in child pornography, let alone sought it out. Rather, as Mr. Grant's therapist testified, Mr. Grant does *not* have any indicia of a pedophile, is not attracted to children, sexual or otherwise, and has no interest in child pornography. (RT: Vol. II: 112:7-122:7; 113:6-16; Respondent 's Exhs. Q, R and S.) Instead, any possession of child pornography, whether the two images he received unsolicited and immediately deleted or the 19 images which reasonable minds could differ as to the subjects' age, was *incidental* to Mr. Grant's prior behavior of looking at adult internet pornography. (*Id.*) As such, the State Bar did *not* prove by clear and convincing evidence that the facts and circumstances surrounding Mr. Grant's conduct involved moral turpitude.

///

///

///

E. Violation of Section 311.11(a) Is Not an Offense Inherently Involving Moral Turpitude.

As the State Bar correctly points out in its Petition, a violation of law is not moral turpitude per se unless *in every case* it evidences bad moral character. (P. 14 [emphasis in original].) The legislature appears not to characterize every violation of Section 311.11(a) as an act which involves moral turpitude, case law does not hold that every violation is an act which involves moral turpitude, and State Bar disciplinary proceedings for members convicted of section 311.11(a) reveal that a violation of Section 311.11(a) does not in every case involve moral turpitude.

1. A violation of Section 311.11(a) does not inherently demonstrate a "Readiness to Do Evil".

This Court has held that crimes of moral turpitude (not involving dishonesty) are those crimes which indicate a "general readiness to do evil." (*People v. Castro* (1985) 38 Cal.3d 301.) Such crimes are those "that are extremely repugnant to accepted moral standards such as murder or ***serious*** sexual offenses." (*In re Duggan* (1976) 17 Cal.3d 416; *In re Fahey* (1973) 8 Cal.3d 842, 849; *In re Boyd* (1957) 48 Cal.2d 69 (emphasis added; internal citations omitted).) The "readiness to do evil" standard "includes crimes which demonstrate moral depravity other than dishonesty: *child molestation, crimes of violence, torture, brutality* and so on." (*People v. Ballard* (1993) 13

Cal.App.4th 687, citing *Castro*, supra, 38 Cal.3d at p. 315 (emphasis added).)

Non-sexual crimes meeting the "readiness to do evil" standard have included: terrorist threats (see *People v. Thornton* (1992) 3 Cal.App.4th 419, 424 (because it involved the knowing infliction of mental terror on the victim); assault by means of force likely to produce great bodily injury (i.e., battery combined with additional elements) (see *People v. Elwell* (1988) 206 Cal.App. 3d 171); possession of heroin with intent to sell (*Castro*, supra), (the crime involves "the intent to corrupt others"); and felony hit-and-run (see *People v. Bautista* (1990) 217 Cal.App.3d 1 (requires constructive knowledge). **Sexual crimes** meeting the"serious sexual offenses" standard have included: sexual battery (see *People v. Chavez* (2000) 84 Cal.App.4th 25 (the degrading use of another, against her will, for one's own sexual arousal); solicitation of a lewd act in public (see *McLaughlin v. Board of Medical Examiners* (1973) 35 Cal.App.3d 1010); and child molestation (see *In re Lesansky* (2001) 25 Cal. 4th 11).

Crimes ***not*** meeting the readiness to do evil standard have included: simple battery (see *People v. Lindsay* (1989) 209 Cal.App.3d 849, 855-856); simple possession of heroin (see *Castro*, supra); and assault with a deadly weapon (see *In re Strick* (1983) 34 Cal.3d 891). **Sexual crimes** *not* meeting this standard have included physical acts against someone; i.e., statutory rape (see *Bernstein v. Board of Medical Examiners* (1962) 204 Cal.App.2d 378).

Notably, in *all* cases where the (sexual) crime involved moral turpitude,

the act or offense involved specific intent on the part of the actor (i.e., scienter), and the act was against a person or person's will. That is, the crime or act involved "a desire **to corrupt, [harm] or offend others**." (*Ballard*, citing *Castro*, supra, 38 Cal.3d at p. 315 (emphasis added).)

The Review Department opinion correctly considered the wide range of conduct which could result in a conviction, and correctly considered the nature of a violation of Section 311.11(a) in comparison to other crimes, when it concluded that "merely possessing child pornography after receiving it from an unsolicited source" does not necessarily evidence bad moral character. (Rev. Dept. Opn., p. 3.) Thus, it is misleading to state, as the Petition does, that a person such as Mr. Grant who merely possessed child pornography, willingly participated in the criminal child pornography industry. (Pp. 2, 3 and 13.)

2. The legislature distinguishes violations of Section 311.11(a) from other more serious sexual offenses.

California's legislature has enacted several statutory schemes which impliedly distinguish between **serious** sexual offenses and non-serious sexual offenses, including, but not limited to, the sex offender registration scheme and the scheme affording convicted persons to have their records expunged. In

each of these schemes, Section 311.11(a) is *not* deemed serious.[5]

Under Penal Code section 290, persons convicted of certain enumerated crimes are required to register. The purpose of the registration requirement is not punitive, but "*regulatory in nature*." (See *In re Alva* (2004) 33 Cal.4th 254.) Although the requirement is often referred to as a "lifetime requirement," this is not technically correct. Rather, the legislature crafted a means whereby it is *not* a lifetime requirement; specifically, a registrant may obtain a certificate of rehabilitation for relief from the registration requirement. (See § 290.5, subd. (a); and see *People v. Ansell* (2001) 25 Cal.4th 868, 877 & fn. 17.)

Under a 1997 amendment to section Penal Code section 4852.01, persons convicted of certain offenses are ineligible for a certificate of rehabilitation. (Sec. 4852.01, subd. (d).) Those ineligible include persons convicted of rape, sexual battery, and child molestation, all of which are acts involving physical contact and an intent to harm another. Notably, Section 311.11(a) is *not* a crime that was included in the 1997 amendment precluding rehabilitation. As recently stated by the Court, these "provisions are consistent with the regulatory purpose to monitor convicted sex offenders, who are

---

[5] The use of the term "serious" in this discussion does not mean than any crime, or any sex-related crime, should be minimized. However, insofar as a line of Supreme Court cases addressing moral turpitude have used the term "serious sexual offenses," see e.g., *In re Duggan* (1976) 17 Cal.3d 416; *In re Fahey* (1973) 8 Cal.3d 842, 849; *In re Boyd* (1957) 48 Cal. 2d 69, the use of the adjective "serious" in the characterization of the offense obviously is meant to distinguish certain crimes or offenses from other crimes or offenses. It is within these parameters that this brief discusses whether violation of section 311.11(a) is a serious sexual offense as *People v. Castro* and its progeny have used the term and whether it necessarily involves turpitude.

generally considered susceptible to recidivism, but to *end monitoring* of those who have demonstrated that their likelihood of reoffense is low." (*In re Alva, supra*, 25 Cal.4th 868 (emphasis added).)

Under Penal Code section 1203.4, a person convicted of a crime may move to expunge his or her conviction. (Pen. Code, § 1203.4, subd. (a).) As with the registration scheme, the provisions for expungement were amended to make section 1203.4 relief unavailable to those convicted of certain sex offenses, including violations of Penal Code sections 286 (sodomy), 288 (lewd and lascivious behavior), 288a (oral copulation), 288.5 (sexual abuse of child), 289 (penetration with foreign object), or 261.5 (unlawful sexual intercourse with a minor). As with the 1997 changes to the registration scheme, Section 311.11(a) is *not* a crime that was included in the 1997 amendment to section 1203.4 precluding expungement.[6]

In making the distinction between those crimes which are eligible for a certificate of rehabilitation under section 4852.04 and for which a person may seek expungement under section 1203.4, and those crimes which are not eligible for such relief, the legislature impliedly found that violation of Section 311.11(a) is *not* a serious sexual offense; that is, it is distinguishable from those crimes and that conduct (such as rape, child molestation, and sexual battery) which are serious sexual offenses.

---

[6] "Both amendments were contained in Assembly Bill No. 729 (1997-1998 Reg. Sess.); these amendments were the only provisions of the bill. (Stats. 1997, ch. 61.)" *People v Arata* (2007) 151 Cal.App.4th 778.

For all of the foregoing reasons, a violation of Section 311.11(a) does not involve moral turpitude per se.

3. The Review Department's recommended discipline is appropriate in light of Mr. Grant conduct.

The Petition's argument concerning the consistency of discipline imposed is illogical because it fails to take into account that the facts and circumstances surrounding members' misconduct varies greatly. In certain instances, such as the matters cited in the Petition (at p. 3 fn. 2) disbarment may have been appropriate based on the members' conduct. In other instances, the State Bar Court has found that conviction for violation of Section 311.11(a) does *not* in all instances require disbarment, summary or otherwise, again because conduct varies. For example, in *In the Matter of David Elias Fetterman* (SBN 189990, Case No. 01-C-01980), the member was convicted of one count of possession of child pornography. The member had child pornography on his work and home computers, had participated in an online chat wherein he consistently expressed a sexual interest in children and child pornography, and had sent photos of adult males having sex with minors. The member was suspended for two years, stayed, placed on two years of probation with a 1-year actual suspension.

In *In the Matter of David James Bornstein*, (SBN 65256, Case No. 04-C-14699), the member was convicted of a one count of possession of child

pornography. He had purchased access to a website which featured images of child pornography, and law enforcement had uncovered approximately ***9,500 images of child pornography*** on the member's computers. The member also was then a deputy attorney general for the State of California, and had stated that he was attending a hearing when forensics showed that he was at home watching a pornographic movie he had downloaded. The member received a 3-year actual suspension.

Finally, there are instances where the facts and circumstances surrounding a member's conduct does *not* involve moral turpitude. As the facts of Mr. Grant show, Mr. Grant viewed *adult* internet pornography; of the images in Mr. Grant's possession, less than 0.00019% possibly depicted a minor under age 18. With respect to the 19 questionable images, "reasonable minds could differ on whether the subjects in the images were actually under 18 years old." (Rev. Dept. Opn., pp. 9-10.) And as the record showed (either by the State Bar's witness' testimony and/or stipulation by the State Bar's trial counsel), there was *no* evidence that Mr. downloaded any images from a website dedicated to or known for child pornography, *no* evidence that Mr. Grant posted any images onto a public bulletin board, *no* evidence that Mr. Grant shared any images using peer-to-peer programs, and *no* evidence that Mr. Grant "chatted, either instant messaging or e-mailing or otherwise communicated, with minors." (RT: Vol. I: 99:25-100:3, 117:1-15, 117:17:20, 122:20-123:3.)

IV. CONCLUSION

Whether a violation of Section 311.11(a) is a crime that involves moral turpitude is not novel and there is no lack of consistency in how the State Bar Court has been handling such cases. Furthermore, a violation of Section 311.11(a) is not an offense inherently involving moral turpitude.

Additionally, the case put on by the Office of Chief Trial Counsel is problematic for a number of reasons, including that at trial evidence was introduced in violation of the rules of evidence, Mr. Grant was deprived of a fair hearing and due process, and the State Bar did not prove Mr. Grant was culpable by clear and convincing evidence.

Moreover, the Review Department's recommended discipline is appropriate.

For all of the foregoing reasons, this case is not an appropriate case for Supreme Court review, and the Petition should be denied.

DATED: January 30, 2012

L. OFFS. OF MICHAEL G. YORK

By: _____
MICHAEL G. YORK
Attorneys for Respondent
GARY DOUGLASS GRANT

CERTIFICATION OF NUMBER OF WORDS

I hereby certify there are less than 8,000 words in this Brief.

DATED: January 30, 2012

L. OFFS. OF MICHAEL G. YORK

By: _____
MICHAEL G. YORK
Attorneys for Respondent
GARY DOUGLASS GRANT

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am over the age of eighteen and not a party to this action. I am employ-ed in the County of Orange, State of California. My business address is 1301 Dove Street, Suite 1000, Newport Beach, California 92660.

On January 30, 2012, I served the foregoing document described as ANSWER on the interested parties:

[X] (BY MAIL): By placing [ ] the original [X] the number of true and correct copies thereof set forth on the attached list in envelopes addressed as set forth on the attached list, sealing them, and placing them for collection and mailing on that date with postage thereon fully prepaid following ordinary business practices. I am ''readily familiar'' with the business' practice of collection and processing correspondence for mailing with the United States Postal Service. Under that practice, it would be deposited with the United States Postal Service in Newport Beach, California on that same day, in the ordinary course of business. I am aware that on motion of the party served, service is invalid if postal cancellation date or postage meter date is more than (1) day after date of deposit for mailing in the affidavit.

[ ] (BY PERSONAL SERVICE): By placing a true and correct copy thereof in an envelope(s) addressed as set forth on the attached list, and sealing it. I delivered such envelope(s) by hand to the office(s) of the addressee(s).

[ ] (BY OVERNIGHT DELIVERY): By placing a true and correct copy thereof in an envelope(s) addressed as set forth on the attached list, sealing it, and placing it for collection and delivery by an express service carrier providing for overnight delivery, with delivery fees paid or provided for.

[ ] (BY FACSIMILE): By transmitting a true and correct copy via facsimile to the person(s) at the telephone number(s) set forth on the attached list. The transmission was reported as complete and without error.

[X] STATE - I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: January 30, 2012

MICHAEL G. YORK

LIST

Three copies:

Starr Babcock
Richard J. Zanassi
Mark Torres-Gil
Office of General Counsel
The State Bar of California
180 Howard St.
San Francisco, CA 94105

One copy:

Clerk of the State Bar Court
1149 South Hill St.
Los Angeles, CA 90015-2299